Tiang Kwong Ee v Ing Kai Hong (S) Sdn Bhd

HIGH COURT (SIBU) — CIVIL APPEAL NO 11-7 OF 1999
TEE AH SING J
24 FEBRUARY 2000

Civil Procedure *— Appeals to High Court from subordinate court — Amount in dispute less than RM10,000 — Notice of appeal must state questions of law that appellant wishes to appeal on — Whether failure to do so will nullify appeal — Courts of Judicature Act 1964 s 28(1)*

Civil Procedure *— Appeals — Notice of appeal — Amount in dispute less than RM10,000 — Notice of appeal must state questions of law that appellant wishes to appeal on — Whether failure to do so will nullify appeal — Courts of Judicature Act 1964 s 28(1)*

By a decision of a magistrate given on 6 January 1999, the appellant was ordered to pay to the respondent the sum of RM5,058.95. The appellant appealed against the decision. Counsel for the respondent raised a preliminary objection on the ground that the amount in dispute is less than RM10,000 and the appeal did not involve a question of law (see s 28(1) of the Courts of Judicature Act 1964). However, counsel for the appellant argued that: (i) the learned magistrate erred in law in failing to take adequate consideration of the fact that the plaintiff had failed to follow the rules of pleadings that a claim for special damages must be explicitly claimed in pleadings; and (ii) the magistrate had failed to satisfy himself of the fact that the plaintiff had adduced sufficient evidence to prove the alleged loss.

Held, dismissing the appeal:

(1) An appellant intending to appeal from the decision of the subordinate court where the quantum is less than RM10,000, must state generally in the notice of appeal in Form 140, the question or questions of law that he wishes to appeal on (see p 760E–H); *Mohamad Safuan bin Wasidin & Anor v Mohd Ridhuan bin Ahmad (an infant)* [1994] 2 MLJ 187 followed. The appellant's notice of appeal did not state generally the question or questions of law that he wishes to appeal on. The failure to state in the notice of appeal in Form 140 the question or questions of law involved was fatal and would nullify the appeal (see p 760H–I).

(2) The respondent is claiming for RM5,058.95 in respect of the goods damaged by rain water. So the special damage of RM5,058.95 has been pleaded. From the learned magistrate's ground of judgment, it is clear that he was aware that parties are bound by their pleadings. So there is no question of law involved (see p 761D–E). There was evidence for the learned magistrate to find whether the respondent has proved the special damage or not. The grounds raised by the appellant in the memorandum of appeal at best relate to the application of the law to the facts

A and do not involve any question of law alone for decision (see p 762D).

[Bahasa Malaysia summary

B Melalui keputusan yang dibuat oleh majistret pada 6 Januari 1999, perayu telah diarah membayar sebanyak RM5,058.95 kepada responden. Perayu telah membuat rayuan berhubung dengan keputusan tersebut. Peguam bagi pihak responden mengemukakan bantahan permulaan atas alasan jumlah yang dipertikaikan adalah kurang dari RM10,000 dan rayuan tidak melibatkan persoalan C undang-undang (lihat s 28(1) Akta Mahkamah Kehakiman 1964). Bagaimanapun peguam bagi perayu berhujah: (i) majistret melakukan kesilapan undang-undang kerana gagal mengambilkira dengan mencukupi fakta bahawa plaintif telah gagal untuk mematuhi peraturan-peraturan pliding yang menghendaki tuntutan bagi gantirugi khas dituntut dengan jelas; dan (ii) majistret telah gagal D untuk memastikan dirinya berpuashati yang plaintif telah mengemukakan bukti yang cukup untuk membuktikan kerugian yang dituntut adalah kerugian yang dialami.

Diputuskan, menolak rayuan:

E (1) Seorang perayu yang berhasrat untuk membuat rayuan berhubung dengan keputusan mahkamah rendah di mana jumlah tuntutan adalah kurang dari RM10,000, mesti menyatakan dengan secara umum dalam notis rayuan dalam Borang 140, soalan atau soalan-soalan undang-undang yang dia berhasrat untuk membuat rayuan (lihat ms 760E–H); *Mohamad Safuan bin* F *Wasidan & Anor v Mohd Ridhuan bin Ahmad (an infant)* [1994] 2 MLJ 187 diikut. Notis rayuan yang dikemukakan oleh perayu tidak menyatakan secara umum soalan atau soalan-soalan undang-undang yang beliau bercadang untuk membuat rayuan. Kegagalan untuk menyatakan di notis rayuan dalam Borang 140 soalan atau soalan-soalan undang-undang yang berhubungan G adalah satu kegagalan yang memusnah dan mentidaksahkan rayuan (lihat ms 760H–I)

(2) Responden menuntut sejumlah RM5,058.95 berhubung dengan kerosakan barangan yang disebabkan oleh air hujan. Oleh itu, tuntutan gantirugi khas sebanyak RM5,058.95 telah dibuat di H dalam pliding. Berdasarkan kepada alasan penghakiman, adalah jelas bahawa majistret mengetahui yang pihak-pihak yang terlibat adalah tertakluk kepada pliding masing-masing. Oleh itu, tidak ada soalan undang-undang yang terlibat (lihat ms 761D–E) Terdapat keterangan untuk membolehkan majistret membuat keputusan sama ada responden telah dapat membuktikan I kerugian khas atau sebaliknya. Alasan-alasan yang dibangkitkan oleh perayu di dalam memorandum rayuan paling relevan adalah berkait dengan pemakaian undang-undang kepada fakta dan tidak

melibatkan sebarang persoalan undang-undang semata-mata untuk membolehkan keputusan dibuat (lihat ms 762D).]

Notes

For a case on appeals to High Court from subordinate court, see 2(1) *Mallal's Digest* (4th Ed, 1998 Reissue) para 440.

For cases on notice of appeals, see 2(1) *Mallal's Digest* (4th Ed, 1998 Reissue) paras 787–841.

Cases referred to

Abdul Kadir bin Amin v Tan Cheng Chua & Ors Civil Appeal No 12 February 1990 (refd)

Chong Khee Sang v Pang Ah Chee [1984] 1 MLJ 377 (refd)

Hayward & Anor v Pullinger & Partners Ltd [1950] 1 All ER 581 (refd)

Ilkiw v Samuels & Ors [1963] 1 WLR 991 (refd)

Kannaya & Anor v Teh Swee Eng [1994] 1 MLJ 508 (refd)

Mohamad Safuan bin Wasidin & Anor v Mohd Ridhuan bin Ahmad (an infant) [1994] 2 MLJ 187 (folld)

Sulaiman bin Mohamad v Malayan Banking Bhd [1992] 2 MLJ 116 (refd)

Legislation referred to

Courts of Judicature Act 1964 s 28(1)

Appeal from: Magistrates' Court Summons No MMS–73–03–97–III (Magistrates' Court, Sibu)

Michael Tiang (*Wong, Orlando Chua & Co*) for the appellant.
George Lim (*Battenberg & Talma*) for the respondent.

Cur Adv Vult

Tee Ah Sing J: This is an appeal by the appellant against the decision of the learned magistrate given on 6 January 1999 whereby the appellant was ordered to pay to the respondent the sum of RM5,058.95 being loss of pampers with interest at the rate of 8% pa from the date of the summons till payment and costs to be taxed unless agreed.

At the commencement of the hearing of this appeal, the learned counsel for the respondent raised a preliminary objection on the ground that s 28(1) of the Courts of Judicature Act 1964 ('the Act') provides that no appeal shall lie to the High Court from a decision of a subordinate court in any civil matter where the amount in dispute or the value of the subject matter is ten thousand ringgit or less except on a question of law. The subject matter of this appeal is only RM5,058.95. He submitted that none of the grounds of appeal in the memorandum of appeal concerns question of law. They are at best concerned with the application of law to facts. In support the following cases were cited:

A (a) *Kannaya & Anor v Teh Swee Eng* [1994] 1 MLJ 508.

(b) *Abdul Kadir bin Amin v Tan Cheng Chua & Ors* Civil Appeal No 12, February 1990.

There was nothing in the grounds setting out the question of law the appellant wants this court to adjudicate upon. In support the case of B *Sulaiman bin Mohamad v Malayan Banking Bhd* [1992] 2 MLJ 116 was cited.

The learned counsel for the appellant informed the court that the appellant wishes to abandon all the grounds of appeal stated in the memorandum of appeal except grounds (iii) and (iv) which involve only question of the rules of civil pleadings and evidence. C

In respect of ground (iii) he submitted that the learned magistrate erred in law in failing to take adequate consideration of the fact that the respondent had failed to follow the rules of pleadings that a claim for special damage must be explicitly claimed in pleadings with full particulars of how it is made. In support *Bullen and Leake and Jacob's Precedents of Pleadings* D (12th Ed 1975) at p 60 and *Ilkiw v Samuels & Ors* [1963] 1 WLR 991 at p 1006 and *Pleadings: Principles and Practice* by Sir Jack Jacob and Iain S Goldrein were cited.

As the respondent had failed to plead particulars of the special damage in his statement of claim the respondent shall not be allowed at the trial to give evidence of any special damage which is not claimed explicitly in his E statement of claim or particulars. He also submitted that the appellant has no obligation to ask for any particulars of the respondent's special damage during the trial. In support the case of *Hayward & Anor v Pullinger & Partners Ltd* [1950] 1 All ER 581 was cited. So he submitted that the learned magistrate erred in law in taking into consideration of the said invoice F No 28680 tendered at the trial when awarding RM5,058.95 being the special damage claimed by the respondent.

In respect of ground (iv) it was submitted that apparently at the end of the trial the learned magistrate was satisfied with the claim by the respondent that there was a total loss of their goods, namely, pampers in the sum of RM5,058.95 by merely considering the invoice No 28680 produced G by PW1. What the respondent had done in order to discharge their evidential burden was by merely writing a bill to the court to claim for their loss without any credible evidence. In support the case of *Chong Khee Sang v Pang Ah Chee* [1984] 1 MLJ 377 was cited.

In reply the learned counsel for the respondent submitted that it was in H the mind of the learned magistrate all along that parties are bound by the pleadings and this is expressly set out in his judgment in p 12 of the appeal record where he cited three cases on this point.

Counsel for the respondent argued that:

> If your Lordship look at paras 5, 6 and 7(c) which must be read together with I the endorsement in the writ of summons, this claim of RM5,058.95 could refer to only one matter and this is the pampers damaged by water. So there is no question of law before this court to decide but rather on application of facts to the law.

In respect of ground (iv) in p 44 of the appeal record PW1 has given evidence on the invoice which remains unchallenged in the course of the trial. And also his evidence was backed up by two other witnesses, PW2 at p 50 of the appeal record and also PW3 at p 52 of the appeal record. PW2's and PW3's evidence on damages to the pampers were never challenged. A

I shall now deal with the preliminary objection in respect of grounds (iii) and (iv) of the memorandum of appeal. B

Section 28(1) of the Act provides as follows:

> Subject to any other written law, no appeal shall lie to the High Court from a decision of a subordinate court in any civil cause or matter where the amount in dispute or the value of the subject-matter is ten thousand ringgit or less except on a question of law. C

The amount of claim awarded by the learned magistrate is only RM5,058.95 which is less than RM10,000. The appellant cannot appeal in this case unless he can show that there is a question or questions of law involved in the appeal. D

The notice of appeal in Form 140 (in p 18 of the record of appeal) reads as follows:

> TAKE NOTICE that the abovenamed appellant TIANG KWONG EE being dissatisfied with the decision of the Magistrates' Court at Sibu given on 6 January 1999 appeals to the High Court against such part of the said decision which decided that the defendant do pay the plaintiff the sum of RM5,058.95 being loss of pampers with interest at the rate of 8%pa from the date of the summons till payment and costs to be taxed unless agreed. E

In *Sulaiman bin Mohamad v Malayan Banking Bhd* [1992] 2 MLJ 116, his Lordship Lamin J (as he then was) at p 119 said: F

> I am of the view that in the case of an appellant intending to appeal on a question of law, the notice of appeal in Form 140 must state at least in general form the question or questions of law that he wishes to appeal on.

In *Mohamad Safuan bin Wasidin & Anor v Mohd Ridhuan bin Ahmad (an infant)* [1994] 2 MLJ 187, his Lordship Abdul Malik Ishak JC (as he then was) at p 192 said: G

> In my judgment, in the case of an appellant intending to appeal from the decision of the subordinate court where the quantum is less than RM10,000, the notice of appeal in Form 140 must state generally the question or questions of law that he wishes to appeal on. Any failure to conform to this basic statutory requirement would strike at the very core of the appeal and, consequently, would nullify the appeal. H

I am in full agreement with his Lordship Abdul Malik Ishak J.

I am of the view that the appellant's notice of appeal did not state generally the question or questions of law that he wishes to appeal on. The failure to state in the notice of appeal in Form 140 the question or questions of law involved was fatal and would nullify the appeal. I

I shall next deal with grounds (iii) and (iv) of the memorandum of appeal which reads as follows:

(iii) That the learned magistrate erred in law in failing to take adequate consideration of the fact that the plaintiff had failed to follow the rules of pleadings that a claim for special damages must be explicitly claimed in pleadings, with full particulars of how it is made.

(iv) That the learned magistrate erred in law in failing to satisfy himself of the fact that the plaintiff had adduced sufficient and cogent evidence or at all to prove the value of their alleged loss.

Paras 5, 6 and 7(a) of the statement of claim (at p 25 of the appeal record) read as follows:

5 On or about 4 February 1997, the plaintiff discovered that part of their stock of pampers products stored at the second floor of the said company's premises were damaged by water. This was caused by water which had seeped in through the damaged zinc sheets after heavy rain the night before.

6 The loss suffered by the plaintiff was RM5,058.95. Further loss is continuing because water continues to come in through the damaged zinc sheets after raining.

7 And the plaintiff prays as follows:
(a) Special damages in the sum of RM5,058.95.

From a reading of paras 5, 6 and 7(a) of the statement of claim, it is clear that the respondent is claiming for RM5,058.95 in respect of the pampers damaged by rain water. So the special damage of RM5,058.95 has been pleaded. From the learned magistrate's ground of judgment (at p 12 of the appeal record), it is clear that he was aware that parties are bound by their pleadings. So there is no question of law involved.

In respect of ground (iv) of the memorandum of appeal, PW1 in p 44 of the appeal record testified as follows:

The second floor is the store for pampers of baby. It has damaged a lot of pampers and damages were about RM5,058.95.
(refer to p 1 of agreed of bundle).

— the invoice which shows damage of the pampers. The cost was based on the principle cost. This is the nett cost.
(refer p 10 agreed bundle).

- refer to pampers which was damaged by the water.

- refer P11 and 12 – photo showing the damages to the pampers.

And at p 45 of the appeal record PW1 said as follows:

I claimed total loss of the damages because the pampers cannot be used for selling and cannot returned the pampers. All the pampers are still in my office. Total lost is RM5,058.95.

PW2 has testified at p 50 of the appeal record that:

... the photo was taken during the inspection of premises. I held the pampers and showed the damage caused by water.

PW3 has testified at p 51 of the appeal record as follows:

On 4 February 1997, I did visit his premises for purpose that to see his goods were wet. This goods located at second floor. Many pampers damage. It was caused by water on front part of the second floor.

And at p 52 of the appeal record PW3 said:

> In my estimation, it costed about RM5,000 plus.

It would appear that the invoice No 28680 is an agreed document and that PW1 the maker gave evidence. So there was evidence for the learned magistrate to find whether the respondent has proved the special damage or not.

I am in full agreement with his Lordship Selventhiranathan JC (as he then was) in *Kannaya & Anor v Teh Swee Eng* [1994] 1 MLJ 508 where at p 513 he said:

> I also found that the second ground of objection to the appeal by learned counsel for the respondent has merit. I have perused the memorandum of appeal in detail and compared it with the grounds of judgment of the learned magistrate. Having done so, I am satisfied that all the grounds of appeal in the memorandum at best relate to the application of the law to the facts and do not involve any question of law alone for decision. Labelling the grounds of appeal as involving questions of law does not metamorphose what are essentially question of fact into questions of law. The substance is what matters, not the label.

I am of the view that grounds (iii) and (iv) in the memorandum of appeal at best relate to the application of the law to the facts and do not involve any question of law alone for decision.

In view of the foregoing, I uphold the preliminary objection and dismiss the appeal with costs to be taxed unless agreed.

Appeal dismissed.

Reported by Benjamin Yong